IN THE

# Supreme Court of the United States

**October Term, 1954**

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

*Petitioner,*

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

*Respondents.*

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petition of JAMES R. ELLIS, by EMANUEL REDFIELD, his attorney, respectfully shows:

This is an application for a rehearing of the decision in this case by this Court dated June 6, 1955 (Chief Justice

Warren and Justices Black, Douglas, and Clark, dissenting).

Although this case had been previously reargued, it was done so on the Court's own motion. There are compelling reasons, other than the five to four ruling, that necessitates this application.

Upon the prior arguments the time allowed was almost wholly consumed with issues that now appear extraneous. What has been decided was barely touched upon.

(1)

What has been decided and is implicit in the Court's decision is that an organization or a person must plead and prove that the use of the building was granted to "other organizations of a similar character" (as applied to individuals, as distinct from organizations the implication is that the individuals had discussed similar subject matter).

This ruling, it is submitted makes empty the right to talk in such instances, as will be shown. Counsel for the petitioner in drafting his petition studiously and deliberately avoided an allegation that there had been previous use granted to "organizations of a similar character." Not only was this done to avoid the burden of proving such particularized use, but frankly, was fearful that a precedent such as has been enunciated by the Court would render nugatory as a practical matter, the right of equal treatment in the use of public buildings for speaking.

Until now, the rule as enunciated in the *Niemotko* case 340 U. S. 268 was that as to assertions of discrimination

all that had to be shown was that the site was devoted to the public use of assembly and speech on matters of public interest. This is alleged in paragraphs 14, 15, 16, 17 and 18 of the petition. It was deemed a sufficient allegation in order to obtain the right to talk, to show that others have been granted the right to talk. That is why the pleading is brief, but is not "empty."

The allegations of the pleading are deemed admitted by New York law, Section 1291, Civil Practice Act. They are clear and concise. Anything additional could have been criticized as cumulative, corroborative and redundant (cf. Section 1294, Civil Practice Act, which provides for motions against immaterial and redundant matter). It must be remembered that what is involved is a *pleading* and that if any triable issue had been raised by answer a trial for it is provided (Section 1295, Civil Practice Act).

What is now imposed by the Court's decision on an applicant is the burden to plead and prove that a *similar organization* had previously been granted the use (or a person had spoken on a similar topic before). Not only is this an impractical and nullifying burden, but it fails to consider that there is always a *first* occasion. For example in 1926, shortly after the American Civil Liberties Union was organized it was denied the use of a school building in New York for the purpose of discussion (Appeal of American Civil Liberties Union, 36 State Dept. Rep. 97). Had the American Civil Liberties Union been obliged to prove "that other organizations of a similar character" (to quote the Court's opinion) had been granted the use, it could not have done so, because the

organization was new and unique. Furthermore the means of probing into the past records of the board's grants of use would be lacking, either because there were no records, or, if any records existed, they would not reveal with clarity the nature of the organization (other than popularly known ones, such as the Democratic and Republican parties or the Red Cross, etc.) that had previous use. Their names would not necessarily tell their character. Neither would they necessarily reveal what the subject matter of discussion was. Here too, there is a practical difficulty in that even the title of an address may be misleading. For instance, should the records show that a topic was discussed under the title, "Constitutional Limitations," the talk itself might have been nothing but invectives against the police department.

Therefore, these insurmountable practical difficulties would have prevented the use by such a patriotic organization as the American Civil Liberties Union, whose object is to protect the conservative rights that have been won over the centuries and are inscribed in the Bill of Rights.

What was true for the American Civil Liberties Union is true for every organization and person. There is always a first time for a new type of organization.

*Therefore, the rule found in the Niemotko case is the only meaningful and practical one,—that all that has to be shown is that the place was made accessible for public speech, and the petitioner was denied such use.*

The pleading was framed with deliberation, to avoid the effect that five members of this Court has created. To win a free speech case on the burden of proof that has

been imposed by the decision is an empty victory. Should an applicant allege that his organization was a political organization and entitled to the use such as had been granted to other political organizations on prior occasions, he would then be met with a challenge to prove that his organization was a "political" one. How such proof would satisfy any administrative body or court, absent a definition of a "political" organization is in itself a problem.

To bring the matter back to the Chief Justice discussion at the several arguments. Suppose this petitioner called itself a Peace Party—(there is nothing to prevent it from so calling itself), it would then be confronted with queries: as to how votes it had obtained; when it obtained them; how it functions, etc., etc. A veritable Pandora's Box would thus be opened to prove extraneous issues.

Then, to add more difficulties to the supposed simple right of public speech, after the matter had worked its weary way through the Courts (this case, without such a burden of proof took three years) and a victory be gained it would be a pyrrhic and useless one, in most cases. The occasion for the speech by then would be gone.

Thus, the speaker on a novel matter, or indeed, the speaker on a "controversial" or unpopular subject is effectively silenced and suppressed.

It was this power to effectively suppress that was the concern of petitioner's counsel. By following *Niemotko*, as four justices of this Court presumably did, this Court would have adhered to a fairly simple rule for school boards and courts to administer, to wit,—if use for public speech is granted it is open to all. That is the meaning of our

constitutional history and the cases in this Court. Once you place the enormous and impractical burden on a speaker, such as enunciated here, you empower a public official to suppress the novel, the "controversial" and the unpopular.

Thus, by requiring the pleading and proof enunciated in this case, a weapon is placed in hands to eliminate the unpopular and "controversial", even if the Court had not intended to do so. The result in either case will be the same.

**(2)**

The Court overlooked petitioner's contention—which was the main argument in all courts—that the respondents censored and suppressed the petitioner. The allegations are contained in paragraph "18" of the petition. The arguments are found in Points I, II, III and IV of "Brief of Petitioner." The argument is that once public property is made accessible for public speech it is subjected to the constitutional guarantee of freedom from censorship, and that an administrative body must act with standards.

This argument is not related to the argument concerning unequal protection of the laws. True, as the Court's opinion states, the use was created by grace of the statute and could have been completely withheld. But, as petitioner argued, once the use is granted, constitutional protection attaches. This is the expression of *Marsh* v. *Alabama*, 326 U. S. 501, and the other cases cited in Brief of Petitioner, page 21, and other cases cited in that brief, pages 14-21.

The constitutional guarantee that is invoked is that the statute cannot be applied in such manner as to subject petitioner to censorship, by applying the statute without standards and with absolute discretion.

What the Court's decision overlooks is that petitioner contends that the respondents applied the statute without standards and exercised unfettered discretion against petitioner (and also on the grounds that the petitioner's organization is "controversial"). This point about the application of the statute was evidently overlooked in the absorption with the point that the *regulation's* vagueness was not attacked below. The opinion of this Court, page 2, speaks of "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here." Nothing is said about petitioner's attack against the application of the statute in the manner argued in the "Brief of Petitioner," and raised below in the manner set forth on pages 4, 5 and 6 of "Brief of Petitioner," in "Reply Brief of Petitioner" pages 3, 4 and 5 and in "Supplemental Brief of Petitioner on Reargument" page 7.

Even if the regulations had never been enacted, there would still be before the Court the question whether respondent's conduct in censoring the petitioner by the exercise of unchanneled discretion was a denial of due process.

It is submitted that this question has not been answered by the disposition of the claim of discrimination. Absent a claim of discrimination, there would still be before the Court the question whether there is a violation of the protection of free speech by the unfettered exercise of power by the respondent.

Petitioner again urges that the validity of the regulations was before the lower courts and was raised in the manner set forth in "Brief of Petitioner," pages 4 and 5, in "Reply Brief of Petitioner", pages 3, 4 and 5 and in "Supplemental Brief of Petitioner," page 6.

Respectfully submitted,

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## Certificate of Counsel

I, EMANUEL REDFIELD, counsel for the above named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

EMANUEL REDFIELD,
*Counsel for Petitioner.*